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No. 00-755

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SAN FRANCISCO BASEBALL ASSOCIATES, L.P., d/b/a SAN FRANCISCO GIANTS, *et al.*,

Petitioners,

v.

YAN CARLOS RAVELO MONEGRO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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Respondents Yan Carlos Ravelo Monegro, Nelson Rolando Gonzales Sosa, Franklin Alvares Galvez, Rafael Micael de la Cruz, Francisco de los Santos Heredia, Porfirio Alfredo Vasquez Mota, Manuel Acevedo, Angel Esteban Guillen Solano, Carlos Celedonio Sujilio, Edelmiro Reyes Santana, Ignacio Henriquez de la Rosa, Fernando Romero and Tulio Miguel Lizardo Nolosco respectfully request this Court to deny the petition for writ of certiorari.

STATEMENT OF THE CASE

This action arises from the quid pro quo sexual harassment and wrongful termination of 13 professional baseball players by defendant Luis Rosa ("Rosa"), the Giants' Latin American scout, general manager of their minor league team in the Dominican Republic, and the highest ranking Giants official in the Dominican Republic. At the time of the contract, Respondents ranged in age from 16 to 20 years old. Four were 16 years old. Four were 17 years old. At the time of the harassment, each Respondent played within the Giants' minor league system, pursuant to a written contract.

The printed contracts, virtually identical for all Respondents (and printed in English although all Respondents spoke only Spanish), contracted Respondents to play for any team (Minor or Major League) that the Giants chose for a period of at least seven (7) years.[1] Although the contract provides that Respondents were "initially" assigned to the San Pedro Giants, it expressly stated that the assignment was "subject to change at any time." Indeed, for the seven year contractual period, Respondents were

1. Paragraph VI provides for extension under various circumstances.

contractually obligated to report to any Minor or Major League team selected by the Giants as soon as transportation was provided.

The contract also provided fill-in spaces for five separate assignments. Many of the contracts established salary levels at each of the Giants Minor League Clubs, including Bellingham, Washington, Scottsdale, Arizona, and Shreveport, Louisiana. More importantly, Rosa expressly conditioned reassignment to domestic teams upon Respondents' sexual submission.

As a consequence of the vast geographical scope that the contract covered, the contract provided, "This Minor League Uniform Player Contract shall be governed by . . . New York Law." Moreover, the contract expressly stated:

> This Minor League Uniform Player Contract is subject to federal and state legislation, regulations, executive or other official orders and other governmental action, now or hereafter in effect, which *may* affect directly *or indirectly* Player *or* Club. [emphasis added.]

During each Respondent's tenure with the Giants' organization, each was subjected to demands for sexual gratification by Rosa which were expressly stated as a condition for advancement in the Giants organization to teams located in the United States. While most such demands occurred in the Dominican Republic, in the case of Appellant Rafael Micael De La Cruz ("De La Cruz"), the sexual harassment took place in Arizona where he was assigned pursuant to his contract. When Respondents refused to

comply, they were suspended or terminated from their employment. Dismissals originated in Petitioners' San Francisco headquarters.

As a consequence of these sordid events, Respondents brought criminal charges against Rosa in the Dominican Republic, alleging sexual harassment. They also brought the present action in the District Court alleging sex discrimination and harassment in employment, wrongful termination, fraud, battery, conversion, infliction of emotional distress, breach of employment contract, and negligent hiring and supervision.[2] The gravamen of the present complaint is *quid pro quo* sexual harassment and wrongful termination in violation of public policy.

Although the present complaint naturally addresses the sexual harassment by Rosa in the Dominican Republic and Arizona, it is by no means confined to those events. The complaint additionally alleges that Rosa's superiors negligently hired, trained, supervised and retained Rosa. It also alleges that Rosa's supervisors, specifically including Petitioner Jack Hyatt ("Hyatt"), had knowledge of Rosa's conduct but refused to take corrective or remedial action. It also alleges that Petitioners wrongfully terminated several Respondents. Finally, it alleges that Petitioners defrauded Respondents to induce their employment and wrongfully

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2. Petitioners allege that eight of the sixteen claims for relief "aris[e] directly under Dominican law. This assertion is patently incorrect. In fact, the complaint alleges only a single, duplicative claim for sexual harassment under Dominican law. One other claim alleges that Petitioners' conduct violated the public policy of the United States, New York, California and the Dominican Republic. All other claims for relief arise under American statutory or common law.

withheld signing bonuses and portions of paychecks due to Respondents. Evidence pertaining to all of these allegations is exclusively in the domestic forum.

Although Respondents' tenure with the Giants was primarily in the Dominican Republic (and Arizona for De La Cruz), all employment records are maintained in San Francisco. Virtually all documents that are relevant to this action are in San Francisco. Respondents' paychecks and bonuses were paid from San Francisco. Rosa's supervisors resided in and around San Francisco. The subject terminations were executed from San Francisco. Rosa is a resident of Puerto Rico, and therefore is subject to process by the U.S. District Court but beyond compulsory attendance in the Dominican Republic.

Proceedings In The Dominican Republic. Petitioners are correct in asserting that each Respondent filed combined civil and criminal complaints in the Dominican Republic. However, by carefully failing to distinguish between the Dominican civil and criminal actions, Petitioners are able to grossly exaggerate the civil activity in the Dominican Republic.

In fact, the Dominican Prosecuting Attorney and the Investigating Judge have investigated the criminal charges (done only when a criminal action is involved). In this criminal investigation, all decisions regarding the scope and extent of investigation remain solely in the criminal authorities. However, the *civil* litigants remain wholly in the dark regarding the secret criminal investigation. The civil litigants cannot and have not participated in any discovery or witness interviews.

Similarly, Petitioners have identified no civil motion that they had to address in the Dominican Republic. Indeed, the only document that Petitioners submitted as evidence of their participation in the Dominican action can only be characterized as an introduction in which Petitioners are not even identified as a party.

In sum, Petitioners have never identified a single act done in the Dominican Republic that was not necessary for the criminal prosecution. In the Dominican Republic, as in San Francisco, the only act done in furtherance of the civil action has been the filing of a complaint.

More importantly, as long ago as June 26, 1998, Respondents assured Petitioners and the district court that they had no intention or desire to simultaneously prosecute this action in two countries and would not prosecute the Dominican action pending resolution in San Francisco. Thus, Petitioners have not had to defend a civil action in the Dominican Republic and they will not have to defend such an action. Of course, the criminal action in the Dominican Republic continues.

Proceedings In The United States District Court. Petitioners filed a motion to dismiss the complaint on the grounds of *forum non conveniens*, contending that it was more convenient for them to be sued in the Dominican Republic, thousands of miles away from their place of business, rather than in San Francisco where they reside. Significantly, in their motion, Petitioners did not allege that there were any co-defendants or third-party defendants who could not be made to appear in the American forum. Petitioners did not identify a single percipient witness who

was beyond American compulsory process[3] nor did they identify a single document that was located in the Dominican Republic.

The district court granted the motion to dismiss. In so doing, the district court found that the forum which encompassed Petitioners' residences was nonetheless inconvenient to Petitioners based upon only two of the ten private and public interest factors set forth in *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 (1947).[4]

3. In the present petition, Petitioners assert that "the Giants would likely call Miguel Angel Mota and Gabriel McDonald, two former players who recanted their allegations against Rosa . . ." However, Petitioners do not assert that either individual possesses *any* percipient information regarding the independent, separate allegations made by Respondents. Thus, it is unclear how the testimony of these individuals, concerning only their own claims, would even be relevant to the present action, much less material or crucial to Petitioners' defense. Perhaps for this reason, Petitioners never previously argued that these individuals were instrumental to their defense.

4. Private interest factors identified in *Gulf Oil* are:

> Relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to enforceability of a judgment if one is obtained.

Id. At 508. Public interest factors are: the administrative difficulties flowing from court congestion; the "local interest in having localized

(Cont'd)

In addressing the private interest factors, the district court acknowledged that "compulsory process for the attendance of a key witness, Rosa, is only available in the United States. . . ." See Pet. App. 19a. The court also acknowledged that it would be easier to enforce a judgment in the United States because Petitioners have substantial property in the United States but none in the Dominican Republic. *Id.* at 20a. Finally, the court acknowledged that employment and financial records were located in San Francisco. *Id.* at 19a.

The court found that two private interest factors did not apply. First, there was no evidence that any premises in the Dominican Republic needed to be viewed. *Id.* at 20a. In addition, "[t]here do not appear to be any other major factors affecting the ease, expeditiousness, or expense of the trial." *Id.*

The sole private interest factor which the district court found that favored dismissal was that "[t]he most significant sources of proof, *particularly the plaintiffs themselves* and other percipient witnesses . . . are in the Dominican Republic." *Id.* at 19a [emphasis added.] The court also concluded that "[b]ringing these Dominican citizens to the United States is both more difficult and more expensive than bringing American citizens to the Dominican Republic." *Id.* In so concluding, the district court did not and could not

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(Cont'd)
controversies decided at home"; the desire in cases that touch the affairs of many people to hold the trial in their view rather than in a remote location; the interest in having the trial in a forum that is "at home" with the law that must govern the case; and the unfairness of imposing jury duty upon citizens of a community "which has no relation to the litigation." *Id.*

identify any such percipient witness nor the scope of his or her expected testimony because Petitioners, after "actively litigating the criminal/civil proceedings in the Dominican Republic for the past year," could not identify a single witness. In contrast, the district court acknowledged that "Rosa's supervisors and other witnesses from the Giants are in San Francisco. . . ," *Id.* No evidence was submitted to support the district court's assumption of the numerical superiority of Dominican witnesses. Similarly, the court's conclusion that travel *from* the Dominican Republic was more difficult and more expensive than travel *to* the Dominican Republic was directly contrary to the only evidence submitted upon that issue.

In addressing the five public interest factors, the district court dismissed three factors as inapplicable. The court found no evidence that either forum was more congested. *Id.* at 20a. It determined that the case did not impact the affairs of a large number of people. *Id.* Finally, notwithstanding the contractual choice of law, the district court determined that both forums would have to apply both United States law and Dominican law. Therefore, the court determined that the applicable law did not favor either forum. *Id.* at 21a. In addressing the burden of jury duty, the district court observed:

> The emphasis of the jury duty element of the *Gulf Oil* convenience test is that a community should not be burdened with jury duty if it has no relation to the litigation. [Citation.] The community of the San Francisco Bay Area does have a relation to this litigation, because the community is concerned with the actions and reputation of its local baseball team; . . . . *Id.* at 20a.

The district court only found one public interest factor that favored dismissal:

> Given the prevalence of baseball recruitment and hiring by American teams in the Dominican Republic, the interest in having localized controversies decided at home weighs in favor of the Dominican Republic. *Id.* at 20a-21a.[5]

Court of Appeals Decision. On appeal, the Ninth Circuit reversed. Contrary to Petitioners' characterization[6], the Ninth Circuit's opinion represented but a mundane and routine application of standards set forth and reiterated by this Court. The Ninth Circuit announced no new standard, no new law nor even a different emphasis. The opinion announced no disagreement with any other circuit and its analysis conflicted with no appellate decision. The Ninth Circuit began its decision by acknowledging that:

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5. This conclusion is surprising, considering that the Giants have two minor league teams in California and eight in the United States, but only one in the Dominican Republic. Of the major league teams to which Petitioners could be freely assigned, two are located in Canada and the rest in the United States. None is in the Dominican Republic. An overwhelming majority of major and minor league baseball players are recruited in the United States to play on United States teams. Astonishingly, the district court concluded that the occasional recruitment in the Dominican Republic gave that country a greater interest than the country for which virtually all recruitments were made.

6. Oddly, what Petitioners characterize as "a dramatic departure from existing law" was the Ninth Circuit's citation to the standard expressly held by this Court to apply to consideration of the private interest factors. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981).

> A forum non conveniens determination 'is committed to the sound discretion of the trial court,' and 'may be reversed only when there has been a clear abuse of discretion.' [Citation.] A district court may abuse its discretion by relying on an erroneous view of the law, by relying on a clearly erroneous assessment of the evidence, or by striking an unreasonable balance of relevant factors. [Citations.] Pet. App. 3a. [brackets omitted.]

This holding markedly parallels this Court's own statement of the standard for review. In *Piper Aircraft Co. v. Reyno, supra*, 454 U.S. at 257, this Court held:

> The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, *and where its balancing of these factors is reasonable*, its decision deserves substantial deference. [Citations.] [emphasis added.][7]

Applying this standard, the Ninth Circuit examined the district court's analysis of the *Gilbert* factors. Addressing the sole factor relied upon by the district court in concluding that the private interest factors supported dismissal, the Ninth Circuit held:

> there is no showing that access to proof–even aside from Rosa's testimony — would be easier

7. Significantly, Petitioners acknowledge that the Ninth Circuit correctly stated the standard for review. Pet. at 18-19.

> in the Dominican Republic. The Giants asserted in their motion to dismiss in the district court that "the costs of bringing witnesses to California would be significantly greater than litigating the matter in the Dominican Republic," and that "United States citizens have much easier access to the Dominican Republic than Dominican Republic citizens have to enter the United States." But there is no evidence to support these assertions. Indeed, the only evidence before the district court was a declaration tending to show the opposite, stating that visas would be readily available to plaintiffs. Pet. App. at 9a-10a.

Moreover, the Ninth Circuit correctly noted that it remained unclear that the key and crucial witness, Rosa, would appear or could be compelled to appear in the Dominican forum. *Id.* at 9a. Finally, the Ninth Circuit correctly observed that there were no possible co-defendants or third-party defendants beyond the jurisdiction of the American forum. Thus, there was no basis left for the district court's conclusion that private interest factors favored the Dominican forum.

With no private interest factor favoring dismissal, and several (availability of compulsory process, location of documentary evidence) favoring retention, the district court's dismissal was supported only by the slender reed of comparative local interest under the public interest analysis. The Ninth Circuit addressed this factor, too, holding that the defendants' home forum had "a substantial relation to the action" because the very instrument of harassment was created and controlled by Petitioners. Pet. App. at 8a. Thus, not only was the San Francisco forum the home forum of

Petitioners, not only did the local community have an interest in "the actions and reputation of its local baseball team" (as found by the district court) (Pet. App. at 20a), but the San Francisco forum had an interest in the ongoing contractual relationship between the parties that was expressly used as an instrument of harassment.

Significantly, the Ninth Circuit did not hold that the district court had abused its discretion in concluding that the Dominican local interest exceeded the American interest. However, it did hold that whatever difference in local interest existed was not sufficient to *per se* justify dismissal. *See Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628 (3d Cir. 1989) [although district court did not abuse its discretion in concluding that German local interest was stronger, that factor was insufficient to justify dismissal.]

REASONS FOR DENYING THE WRIT

Despite Petitioners' hyperbole, the Ninth Circuit's decision involved no "dramatic departure from existing law." Pet. at 9. Rather, the decision represented a narrow application of this Court's precedents. The Ninth Circuit correctly and properly stated the applicable law, announced no advances and conflicted with neither decisions of this Court nor other courts of appeal. In the end, Petitioners' prayer for certiorari is based only upon the contention that the Ninth Circuit misapplied the properly stated rule of law. While this assertion, too is wrong, it cannot constitute the "compelling" reason for this Court's intervention. S. Ct. R. 10.

I. THE DECISION BELOW CAREFULLY AND NARROWLY ADHERES TO THIS COURT'S PRECEDENT.

The underlying decision represents but a mundane, routine application of the standards set by this Court. Yet, Petitioners argue that the Ninth Circuit has "disregarded this Court's precedent" in its selection of the standard to be applied. Pet. at 12. This argument is curious considering that the Ninth circuit employed the precise standard enunciated by this Court's precedents.

In *Gulf Oil Corp. v. Gilbert, supra*, 330 U.S. at 504,509, this Court addressed the "exceptional circumstances" and "rather rare cases" in which a federal court could decline jurisdiction under the doctrine of *forum non conveniens*. It is important to note that *Gilbert*, a case decided prior to the enactment of § 1404, involved a forum selection in a domestic action that was neither the home forum of any litigant nor the situs where the action arose. Nonetheless, this Court held:

> It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. *Id.* at 508. [footnote omitted.]

In *Piper Aircraft Co. v. Reyno, supra*, 454 U.S. at 241, this Court reiterated and reaffirmed the standard set forth in *Gilbert* and its companion case, *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947), holding:

> a plaintiff's choice of forum should rarely be disturbed. However, when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,' or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems,' the court may, in the exercise of its sound discretion, dismiss the case. [Citation.] To guide trial court discretion, the Court provided a list of 'private interest factors' affecting the convenience of the litigants, and a list of 'public interest factors' affecting the convenience of the forum. [Citation.]

Thus, as the *Piper* Court recognized, the "oppressiveness and vexation" standard addressed the convenience of the litigants and was to be determined by the balancing of the private interest factors. the district court's own "administrative and legal problems" were to be considered in the balancing of the public interest factors.

In the decision below, the Ninth Circuit simply and expressly employed the precise standard established by this Court in addressing the convenience of the litigants. Pet. App. at 10a. Although Petitioners acknowledge that the Ninth Circuit correctly stated the portion of this Court's standard for considering the convenience of the litigants (Pet. at 12-13), Petitioners suggest that the Ninth Circuit somehow overlooked the concomitant obligation to also consider the court's own convenience by considering the public interest factors. This suggestion is belied by the fact that the Ninth circuit specifically addressed the only public

interest factor on which the district court relied, concluding that the Petitioners' home forum was "a forum with a substantial relation to the action." Pet. App. at 8a.

In *Piper*, this Court also addressed the evidentiary presumption that emanates from the plaintiff's choice of forum *per se*, holding that "the presumption in favor of the respondent's forum choice applied with less than maximum force because the real parties in interest are foreign." *Piper Aircraft Co. v. Reyno*, *supra*, 454 U.S. at 261.

In the decision below, the Ninth Circuit both expressly acknowledged and applied this precise standard. Pet. App. at 8a and 10a. In doing so, the Ninth Circuit made the unnoteworthy observation that "less deference is not the same thing as no deference." *Id.* at 10a. Certainly, if this Court intended to eliminate the presumption entirely, it would have so stated.

Moreover, the reason for the distinction made by this Court is significant. In *Piper*, this court explained:

> In *Koster*, the Court indicated that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum. [Citation.] When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference. *Id.* at 255-256 [footnotes omitted.]

Thus, this Court made clear that the central purpose of any *forum non conveniens* inquiry and the evidentiary presumption was to ensure the convenience of the trial forum. This Court did *not* determine that the presumption, or its weight, somehow altered the standard for determining convenience. Indeed, as enunciated in *Koster*, the standard to determine convenience required the balancing of the defendant's oppression and vexation against the plaintiff's convenience "which may be shown to be slight or nonexistent." *Koster v. Lumbermens Mut. Cas. Co.*, *supra*, 330 U.S. at 524. Thus, consideration of the plaintiff's convenience, whether arising from the presumption or other evidentiary factors, was already an integral part of the inquiry.

Petitioners confuse the *standard* to be employed in determining whether the defendant has met its burden of proof with an *evidentiary presumption* applicable to that standard. In *Piper*, this Court simultaneously reaffirmed the applicable standard while it reduced the deference to be accorded a foreign plaintiff's choice of forum *per se*. Certainly, this Court did not reaffirm a standard only to truncate it by evidentiary considerations. The Ninth Circuit's decision is fully consistent with both the standard and evidentiary considerations set forth by this Court.

II. THE DECISION BELOW IS FULLY COMPATIBLE WITH OTHER COURTS OF APPEAL.

Petitioners' confusion regarding the holding of the Ninth Circuit causes them to perceive a nonexistent conflict among the Circuits. As previously indicated, the Ninth Circuit correctly stated and applied the "oppression and vexation"

standard created by this Court to evaluate the convenience of the litigants. It also properly applied the presumption in favor of the foreign plaintiffs' choice of forum with "less deference."

In *Stewart v. Dow Chem. Co.*, 865 F.2d 103, 106 (6th Cir. 1989), the Sixth Circuit stated "there is no requirement in *Piper* . . . that the burden be 'oppressive'. . . ." However, contrary to Petitioners' claim, that statement was not limited to foreign plaintiffs. *Id.*

Moreover, in *Stewart* the court utilized this Court's alternative statement of the same standard. Citing *Piper*, the Sixth Circuit held, " 'Dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice.' " As this Court explained, "In other words, *Gilbert* held that dismissal may be warranted where a plaintiff chooses a particular forum, not because it is convenient but solely in order to harass the defendant or take advantage of favorable law." *Piper Aircraft Co. v. Reyno*, *supra*, 454 U.S. at 262, n.15. Because the *Piper* Court also reaffirmed the "oppressiveness and vexation" standard (*Id.* at 241), it is clear that this Court considered the two statements to be alternative iterations of the same standard.

Similarly, Petitioners attempt to establish a conflict by citation to *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 454 (6th Cir. 1988). This citation is also unavailing to create a conflict where none exists. *Gould* involved an American plaintiff. Thus, the court had no occasion to determine either the standard or the degree of deference to be employed for foreign plaintiffs. *Gould* simply stated that

different principles applied when a case involved a United States citizen rather than a foreign citizen without otherwise defining the difference. The decision below by the Ninth circuit is fully compatible with this limited observation.

Petitioners' attempt to create a conflict between the Ninth and Second Circuits is even more attenuated and approaches dishonesty. Contrary to Petitioners' assertions, the Second Circuit did *not* hold in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) that *Piper* merely established a "neutral rule" for evaluating *forum non conveniens* motions. Rather, the court in *Wiwa* held that "The defendant has the burden . . . to show that the pertinent factors 'tilt[ ] strongly in favor of trial in the foreign forum.' [Citation.] 'The plaintiff's choice of forum should rarely be disturbed.' [Citation.]" *Id.* at 100.

In *Wiwa*, the reference to "a neutral rule" was in reference to the court's observation that "While any plaintiff's selection of a forum is entitled to deference, that deference increases as the plaintiff's ties to the forum increases. *Id.* at 101. This greater deference is "not because of chauvinism or bias in favor of U.S. residents." *Id.* at 102. Thus, the "neutrality" of the rule was only neutrality from chauvinism or bias.

In fact, the Second Circuit has expressly adopted the standard set forth in *Lony v. E. I. DuPont de Nemours & Co., supra*, which Petitioners attempt to characterize as extreme. In *R. Maganlal & Co. v. M. G. Chemical Co., Inc.*, 942 F.2d 164, 168 (2d Cir. 1991), the Second Circuit approvingly cited *Lony* to hold "since a foreign plaintiff's choice of forum is entitled to some weight, a defendant must

still show that the balance of convenience sufficiently favors trial in the foreign forum to overcome the presumption in favor of plaintiff's choice."

Similarly, in *Boosey & Hawkes Music Publishers, Ltd. v. The Walt Disney Co.*, 145 F.3d 481, 491 (2d Cir. 1998), the Second Circuit reversed the dismissal of an action brought by a foreign plaintiff on grounds of *forum non conveniens*, holding that a district court may grant dismissal only if the *Gilbert* factors "strongly support dismissal."

In sum, the decision below conflicts with neither the Sixth or Second Circuit. It does not conflict with any precedent of this Court. The Ninth Circuit's decision conflicts only with Petitioners' incorrect statement of the law.

III. THE NINTH CIRCUIT'S DECISION WAS CORRECT.

It is exceedingly unlikely that this Court will grant the petition simply to review the Ninth Circuit's factual findings. " A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. Granting of the petition is less warranted when the decision below was entirely correct.

First, the Ninth Circuit properly understood its role as an appellate court. Pet. App. at 3a. Its understanding of the standard of review is fully supported by both precedents of this Court (*Piper Aircraft Co. v. Reyno, supra*, 454 U.S. at 257) and by decisions in other Circuits. Thus, in *R. Maganlal & Co. v. M.G. Chemical Co., Inc., supra*, 942 F.2d at 167, the Second Circuit held "a court's discretion in this area is

not so broad as to preclude meaningful appellate review of its decisions. [Citations.] 'A meaningful power of review is the right to determine whether the district court reached an erroneous conclusion on either the facts or the law.' [Citations.]" See *Boosey & Hawkes v. The Walt Disney Co., supra*, 145 F.3d at 491 ("A dismissal for forum non conveniens will be upset on appeal where a defendant has failed to demonstrate that 'an adequate alternative forum exists' and that 'the balance of convenience tilts strongly in favor of trial in the foreign forum."); *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 178 (3d Cir. 1991) (a district court abuses its discretion when it clearly errs in weighing the factors to be considered.)

Second, the Ninth Circuit specifically addressed the two factors relied upon by the district court and found both wanting to justify dismissal. Most importantly, the Ninth Circuit determined that the availability of compulsory process favored the U.S. forum and was balanced by no showing at all of sources of proof in the Dominican Republic. Pet. App. at 9a.

It is true that *Piper* established no particular evidentiary requirement. Pet. at 21. However, *Piper* did require that "defendants must provide enough information to enable the District Court to balance the parties' interests." *Piper Aircraft Co. v. Reyno, supra*, 454 U.S. at 258. In the present case, Petitioners provided nothing.

Very belatedly in their present petition, Petitioners refer to "acquaintances of respondents, various percipient witnesses, and former staff and personnel of the Giants in the Dominican Republic . . ." Pet. at 20. However, because the record is empty, Petitioners can provide no basis for the

materiality of any of these witnesses nor even any reason to assume that such materiality exists. As Petitioners previously argued to the Ninth Circuit, "allegations of quid pro quo sexual harassment suggest conduct that is rarely public." If a mere, vague reference to acquaintances were sufficient, without more, to establish inconvenience, then motions to dismiss based upon *forum non conveniens* would always be granted against foreign plaintiffs.

In contrast, the Dominican forum would leave Respondents without any means to compel the testimony of Rosa. Not only is Rosa a key witness to this action, except for Respondents themselves, he is the most important witness to determine the extent of the remaining defendants' liability. No one possesses more information than Rosa regarding his own hiring, qualifications and background, his own training, his own supervision, the extent of his own authority, or what Petitioners did to prevent sexual harassment. Indeed, Petitioners argued to the Ninth Circuit that *they* would be prejudiced by his absence from trial.

Moreover, in addition to Rosa, all of his supervisors are American and beyond Dominican process. The Ninth Circuit was entirely correct in concluding that the district court's balance of Rosa and all of his supervisors against unidentified witnesses of unknown number was unreasonable.

Yet, without the "sources of proof" factor, the district court's dismissal was supported by nothing more than the relative local interest. Although the Ninth Circuit did not hold that the district court abused its discretion in finding this factor favored dismissal, it correctly decided that the small difference in local interests, if any, was not enough to justify dismissal.

CONCLUSION

The Ninth Circuit correctly stated the standard of review and the standards for determination of a motion to dismiss on the basis of *forum non conveniens*. The court correctly recognized that a foreign plaintiff's choice of forum, without more, was entitled to less deference. It correctly applied these standards to the voluminous record before it. Review by this Court would affect no one but the present litigants.

This Court should deny the petition for certiorari.

Respectfully submitted,

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